

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34776

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL. –  
PETITION FOR DECLARATORY ORDER

Decided: November 23, 2005

On October 27, 2005, National Solid Wastes Management Association (NSWMA)<sup>1</sup> filed a petition for a declaratory order requesting the Board to determine that certain solid waste operations undertaken on property owned by the New York, Susquehanna and Western Railway Corporation (NYS&W) in North Bergen, NJ,<sup>2</sup> do not constitute rail transportation, are not integrally related to rail transportation, and, therefore, are not within the Board's exclusive jurisdiction. NSWMA requests that the Board's decision in this proceeding extend to any other similarly situated solid waste operations, and proposes a procedural schedule for the proceeding.

The following parties have filed reply comments supporting NSWMA's petition: New York State Department of Environmental Conservation; Cape May County Municipal Utilities Authority; Pollution Control Financing Authority of Camden County, NJ; and Bridgewater Resources, Inc. Although it did not specifically call for a proceeding at this time, the Commonwealth of Massachusetts, Office of the Attorney General, has requested a public comment period to permit Massachusetts and others to share their views on the matter if the Board institutes a proceeding. U.S. Congressman Robert Menendez of New Jersey has also written to the Board in support of NSWMA's petition and proposed procedural schedule.

The New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission (NJDEP), Rail-Tech, NYS&W, and Progressive Rail, Incorporated, have separately filed replies urging the Board not to institute a proceeding. NJDEP states that it opposes Board action at this time because it has taken enforcement action against NYS&W in connection with

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<sup>1</sup> NSWMA is joined in this petition by the following parties: New Jersey State League of Municipalities; Village of Ridgefield Park, NJ; Burlington County, NJ; Solid Waste Association of North America; Construction Materials Recycling Assn.; City of Newark, NJ; Hainesport Township, NJ; The U.S. Conference of Mayors; and Integrated Waste Services Association. Collectively, the petitioners will be referred to as "NSWMA."

<sup>2</sup> According to NSWMA's petition, Rail-Tech, L.L.C. (Rail-Tech) operates a solid waste facility at a site located at 16th Street and Secaucus Road in North Bergen (the Site), which is adjacent to a line of railroad owned by NYS&W.

the Site. The enforcement action is now a matter being litigated in the United States District Court for the District of New Jersey. NJDEP also states that the pending district court matter involves essentially the same federal preemption issues that NSWMA has asked the Board to resolve. In addition, NJDEP asserts that the Board “has already enunciated the fundamental principles which the NSWMA petition seeks to establish.” NJDEP Reply at 5.

NYS&W agrees that the Board should not grant NSWMA’s petition at this time, citing the pending federal court case. NYS&W adds that NSWMA’s petition is moot because Rail-Tech has been ejected from the Site and the facility located there has been closed permanently.<sup>3</sup> NJDEP questions whether the Site is entirely inactive, based on its observation of activities at the Site. *Id.* at 4, n.5.

NYS&W maintains that whether operations at any given location may constitute transportation by rail carrier must be determined on a case-by-case, fact-specific basis and, therefore, that the Board should not address NSWMA’s request for a finding with respect to “similarly situated facilities.” NYS&W reports that it suggested to the federal district court that it could refer the federal preemption issue to the Board but that the court did not act upon the suggestion. NJDEP objected in court to the suggestion.

## DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. *See Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority – Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989).

NJDEP and NYS&W have presented information and arguments raising questions about whether the Board should institute a proceeding at this time. They point to the ongoing litigation in federal court and both indicate a desire to move forward with that case without the involvement of the Board. Moreover, the record indicates that the Site may no longer be operating.

In light of the pending federal district court case and the status of the Site, further public input on NSWMA’s petition is warranted. Accordingly, a further opportunity will be provided for interested parties to comment on the question of whether the Board should institute a proceeding as sought by NSWMA before that determination is made. Interested parties will have 20 days from the date of service of this decision to file such comments, and 10 days thereafter to reply to any comments received. Copies of any further comments and replies should be served on persons listed on the service list for this proceeding that is available on the Board’s website at [www.stb.dot.gov](http://www.stb.dot.gov).

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<sup>3</sup> In its reply comments, Rail-Tech also cites these circumstances in arguing that the petition for declaratory should be denied as moot.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Within 20 days of the service date of this decision (by December 13, 2005), interested parties may file comments concerning whether the Board should institute a declaratory order pursuant to NSWMA's petition.
2. Within 30 days of the service date of this decision (by December 23, 2005), interested parties may file replies responding to the comments received.
3. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary